BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016100825
v.	ORDER FOLLOWING EXPEDITED PREHEARING CONFERENCE, DENYING MOTION TO CONTINUE THE PREHEARING CONFERENCE, AND DENYING MOTION TO UNEXPEDITE THE DUE PROCESS HEARING
ABC UNIFIED SCHOOL DISTRICT.	

On November 7, 2016, a telephonic expedited prehearing conference was held before Administrative Law Judge Laurie Gorsline, Office of Administrative Hearings. Jean Murrell Adams, Attorney at Law, appeared on behalf of Student. Debra K. Ferdman, Attorney at Law, appeared on behalf of District. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Motion to Continue the PHC. During the PHC, Student's counsel made an oral motion to continue the PHC one day on the grounds that the parties had reached a settlement of the dispute which had yet to be signed. Student's motion to continue the PHC was denied at the PHC, on the grounds that OAH does not conduct PHC's on Tuesdays and a continuance was inappropriate because the hearing is expedited.

2. Motion to Unexpedite the Due Process Hearing. On November 4, 2016, District made a motion to unexpedite this matter and vacate the expedited dates because Student did not request an expedited hearing and none of the issues are properly the subject of an expedited hearing. Student did not oppose District's motion. District's motion was denied at the PHC on the following grounds:

A parent of a child with a disability who disagrees with any decision by a school district regarding a change in educational placement of the child based upon a violation of a code of student conduct, or who disagrees with a manifestation determination made by the district, may request and is entitled to receive an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a) (2006).) An expedited due process hearing before OAH must occur within 20 school days of the date the complaint requesting the hearing is filed. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2)(2006 .) The procedural right to an expedited due process hearing is mandatory and does not authorize OAH to make exceptions or grant continuances of expedited matters. (*Ibid.*) In sum, a matter can only be

unexpedited or continued if no issue is alleged that is subject to an expedited hearing, or if the student withdraws the issues in the complaint that triggered the expedited hearing.

OAH scheduled this matter for an expedited hearing because there was a challenge to District's manifestation determinations. Issue 4 of Student's complaint alleges that District held two manifestation determinations, the first involving Student's February 2015 suspension and the second involving Student's May 2016 suspension, and documented that Student's behaviors resulting in his suspensions were not a manifestation of disability. Student also seeks as part of his remedies, an order expunging all of the suspensions from his school records. Accordingly, an expedited due process hearing on Student's Issue 4 is mandatory and shall be heard as scheduled on the dates set forth below.

3. Hearing Dates, Times, and Location. The expedited due process hearing shall take place on **November 15, 16 and 17, 2016**, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The expedited hearing shall take place at **ABC Unified School District, 16700 Norwalk Blvd., Cerritos, California 90703.** The expedited hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, the named local educational agency shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency failed to certify that the facilities used for this case comply with the law. **The local educational agency shall certify to OAH that its hearing facilities comply with the law or notify OAH that it is unable to comply with this order by no later than November 9, 2016.**

The hearing room shall be available to the ALJ one hour before the scheduled hearing, and shall be secured and locked at the end of each hearing day. **The same hearing room shall be used for each day of hearing**, unless otherwise ordered. Prior to the beginning of the hearing, District shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ near an electrical outlet. District shall ensure that drinking water and tissue are available to all parties, witnesses and the ALJ. **District shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, Student's attorney, and District's attorney.**

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

4. Issues and Proposed Resolutions. The issues at the expedited due process hearing, and the proposed resolutions, are listed below.

Student's Expedited Issues:

(1) Did District violate Student's rights under title 20 United States Code section 1415(k) when it determined that the behavior which resulted in his February 2015 suspension was not a manifestation of his disability?

(2) Did District violate Student's rights under title 20 United States Code section 1415(k) when it determined that the behavior which resulted in his May 2016 suspension was not a manifestation of his disability?

Student's Complaint seeks all of the following Proposed Resolutions:

(1) Independent educational evaluations;

(2) Compensatory education;

(3) Expungement of suspension references from Student's school records;

(4) Funding of an appropriate placement.

5. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. To the extent practicable, exhibits in the exhibit binders shall be in chronological order.

In the event of duplicate exhibits, the most legible version will be used. The parties shall meet and confer **by November 9, 2016** to delete duplicate exhibits from the exhibit binders. The parties are not required to renumber exhibits if they delete exhibits after the exchange of documents.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes and curriculum vitae not later than **November 9, 2016.**

District shall include as part of its exhibits the school calendar(s) for all of the years at issue. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), District shall serve a copy of the school calendar(s) on Student **by November 9, 2016** and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ.

If the parties intend to rely on IEP's, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and any typewritten or handwritten notes or comments, if any, written on the IEP(s). Excerpts of an audio record of an IEP team meeting, if any, should, in addition to the audio record offered, be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party along with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcriptions need not be prepared by a certified court reporter.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and/or the ALJ rules that it is admissible. Education Code section 56505, subd. (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been timely exchanged.

6. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order.

The parties shall comply with Education Code section 56505 (e)(7). No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and/or at the discretion of the ALJ. Education Code section 56505, subd. (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been timely disclosed.

The parties shall meet and confer **by November 9, 2016**, as to the schedule of witnesses and coordinate the availability and order of witnesses to ensure that there is a witness available to testify at all times during the hearing and to ensure that the hearing is completed as scheduled.

During the Prehearing Conference, the parties were ordered to meet and confer by **no later than November 9, 2016 at 5:00 p.m.,** and identify the witnesses on the witness lists who cannot be produced at hearing without a subpoena and provide the witnesses contact information to opposing counsel so that subpoenas can be issued. As part of the meet and confer process, District's counsel shall inform Student's counsel as to whether the witnesses on Student's witness list are employed by or otherwise under the control of District and will be produced at hearing, and if not, shall provide Student's counsel with the last known contact information, including home address, for that witness no later than **November 9, 2016 at 5:00 p.m.** Any contact information provided by District shall be used by Student's counsel for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disseminated to any other person(s).

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with **one joint detailed hour-by-hour schedule** of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination and identify which party is calling each witness as part of his/its case-in-chief. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. District shall have witnesses available in case agreement on a witness list is not reached. The parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony each witness is expected to take.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear such evidence. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing after consideration of all of the following: (i) issues to be heard, (ii) complexity of facts to be proven, (iii) ability of the parties or their representatives to present their respective cases, and (iv) estimates of the parties as to the time needed to present their respective cases.

7. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

8. Telephonic Testimony. Neither party requested telephonic testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of duplicate copies of the exhibit binders from all parties, containing all of each party's exhibits and shall instruct the witness not to remove any documents from the exhibit binders. **Duplicate physical copies in binders must be provided to the witness. Faxed or electronic copies are unacceptable**. District shall have sound equipment in the hearing room that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, **the witness shall testify on a land-line telephone while alone in a private room**. No witness will be heard by telephone unless all these requirements have been fulfilled.

9. Electronic Recording of Hearing.

a. Audio Recording. The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

10. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student is the petitioning party. As such, Student shall present its case-in-chief, followed by District, subject to paragraph 5 above.

11. Motions. District contemplates filing a motion in limine to limit the testimony and documentary evidence in the expedited hearing. **At the PHC, the parties were ordered to meet and confer by November 9, 2016 to attempt to resolve any dispute regarding these issues. If the parties are unable to resolve these issues, District may file an appropriate motion which shall be addressed at hearing by the ALJ.**

No other pretrial motions are pending or contemplated. Any other motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of November 7, 2016.

12. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory

education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

13. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

The parties shall meet and confer **by November 9, 2016** to determine legal and factual stipulations, if any, to be submitted at hearing.

14. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be set to silent during the hearing unless permission to the contrary is obtained from the ALJ. There shall be no texting permitted while the hearing is in session.

15. Special Needs and Accommodations. **A Spanish interpreter is required for the hearing.** Neither party requested any additional accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at: http://www.dgs.ca.gov/oah/Home/Accommodations.aspx

16. Hearing Closed To the Public. The hearing shall be closed to the public.

17. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY **FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.**

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have

been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

18. Failure to Comply. The failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: November 7, 2016

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LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings